

Due service of the within Petition for Writ of
Certiorari and Brief in support thereof is hereby
acknowledged this.....day of March, A. D. 1938.

Counsel for Respondents.

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CHARLES ELMORE DROPLEY
OAKM

IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

Wm. H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., *et al.*,

Respondents.

BRIEF OF PETITIONERS IN OPPOSITION TO
THE MOTION OF RESPONDENTS FOR A
DIMINUTION OF THE RECORD AND FOR
CERTIORARI.

Wm. H. NEBLETT,

R. DEAN WARNER,

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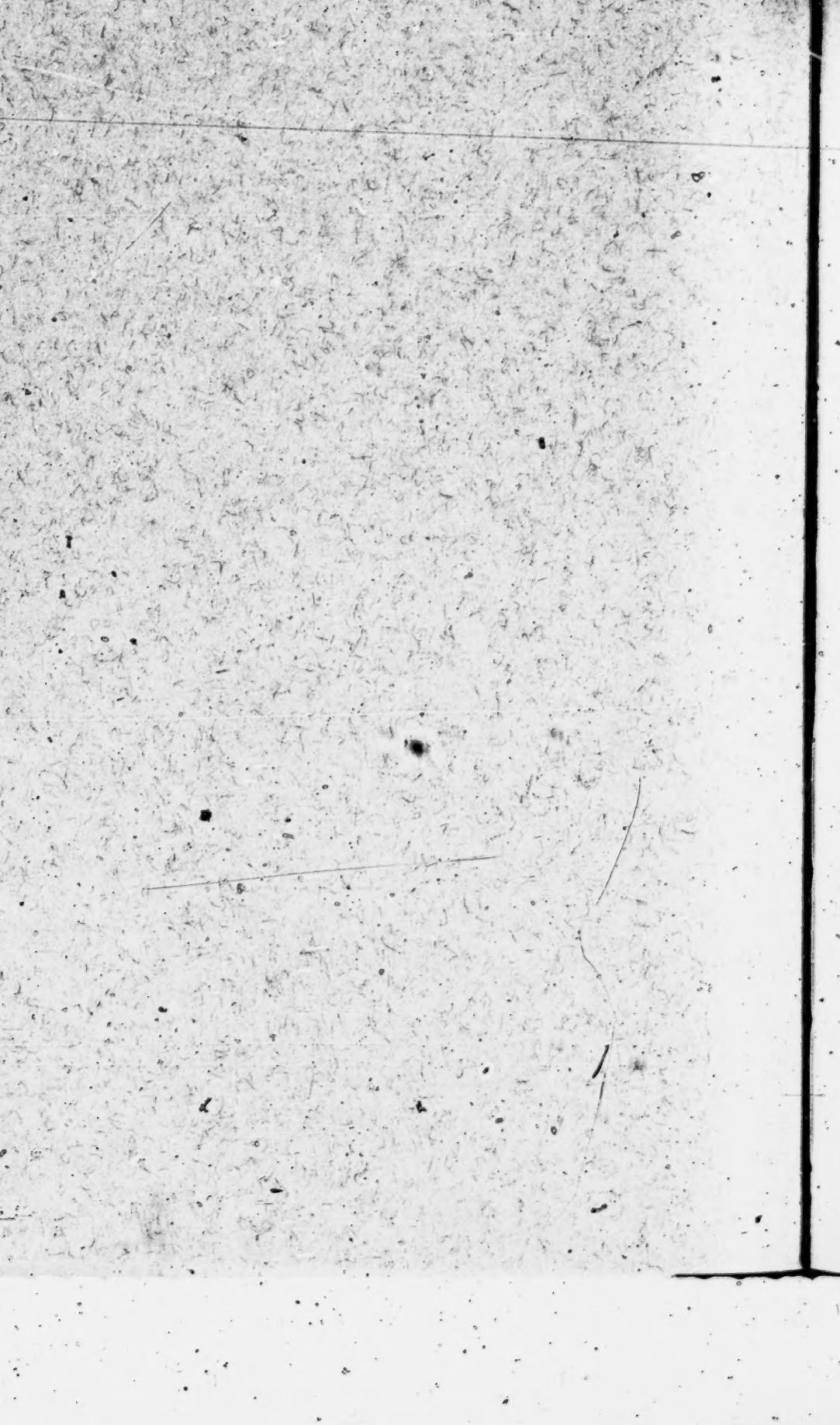
Counsel for Petitioners.

ALFRED F. MACDONALD,

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VERNON BETTIN,

Of Counsel for Petitioners.



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I.

Argument.

The respondents Carroll C. Day, Harry C. Fabling, Joseph N. Gantz, Jack Paschall and Ralph J. Wetzel have suggested a *diminution* of the record and moved for *certiorari* upon the ground that the transcript of record before this court is incomplete.

What the moving parties seek to bring up is a record of subsequent proceedings in the lower court¹ which arose

¹The Superior Court is the court of original jurisdiction in California.

after the appeal to the Supreme Court of California had been perfected from the judgment of the lower court rendered on December 4, 1936. The judgment of December 4, 1936, was affirmed by the Supreme Court of California² and is now before the Supreme Court of the United States on writ of certiorari, granted May 16, 1938.³

The decision of the Supreme Court of California shows that the proposed record now attempted to be brought up was not considered by that court in its decision. The suggested diminution was wholly immaterial to the Supreme Court of California's decision and is, likewise, immaterial here.

The motion for diminution shows that no part of the record now sought to be brought up came into being until after the appeal now before this court on certiorari had been perfected to the Supreme Court of California. Furthermore the entire record, before the Supreme Court of California, when it rendered its decision, is now before this court, as well as all proceedings taken by the Supreme Court of California on that record.⁴ Nothing is missing from it.

The Supreme Court of California did not consider in its opinion what is now sought to be brought up on motion for certiorari.

² *Carpenter v. Pacific Mutual Life Insurance Company of California*, 10 Cal. (2d) 307; R. 1509-1544.

³ *Nebblett v. Carpenter*, 82 L. Ed. Adv. Op. 1037.

⁴ R. 1509-1545.

This court holds that no motion for certiorari will be granted, unless something has been omitted from the record, before the court below, and considered by it in making its decision.

"Nor can we allow a certiorari, when it appears that nothing is omitted from the record which is of record in the court below."

City of Chicago v. Bigelow, 7 Wallace 17.

"An order of diminution of the record, or certiorari, will not be issued to bring up matters not of record or not considered in the court below, * * *."

4 C. J. Sec. 1613, Sec. 1135-d.

The motion and its supporting papers show that a separate appeal is pending to the Supreme Court of California on the record now sought to be brought before this court. It is not made to appear what disposition, if any, has been made of that appeal by the Supreme Court of California. Until the Supreme Court of California passes on the appeal, this court will not consider that record.⁵

The Supreme Court of the State of California is compelled by statute to take judicial notice of the records of the Supreme Court of the United States, but there is no such burden imposed on the Supreme Court of the United States to take judicial notice of the records of cases pending on appeal before the Supreme Courts of the various states and before decision by those courts. If the rule

⁵Judicial Code §237; 28 U. S. C. A. §344.

were otherwise, there would be no point to this motion, because the Supreme Court could take judicial notice of the record without bringing it up and there would be no reason for the statutes permitting motions for diminution and for certiorari.

The record sought to be brought up, not having been considered in the decision of the Supreme Court of California, now before this court on writ of certiorari already granted, it is immaterial for all purposes here.

Petitioners pray that the motion be denied.

Respectfully submitted,

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